

PHILIP J. MACRES
PRINCIPAL
202.289.6956

PMACRES@KLEINLAWPLLC.COM

June 22, 2017

VIA ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20054

**Re: Notice of Ex Parte Presentation:
Petition of AT&T Services, Inc. For Forbearance Under 47 U.S.C. § 160(c)
From Enforcement Of Certain Rules For Switched Access Services And Toll
*Free Database Dip Charges, WC Docket No. 16-363***

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter provides notice that on June 20, 2017, Robert McCausland, Vice President, Regulatory and Government Affairs of West Telecom Services, LLC ("West"), Michael Shultz, Vice President, Regulatory & Public Policy and Brian Carr, Vice President, Carrier Services of Consolidated Communications Companies ("Consolidated"), along with the undersigned and Allen Zoracki, counsel for Consolidated and West (collectively, "West and Consolidated Representatives") met with Amy Bender, Legal Advisor, Wireline, to Commissioner O'Reilly and separately with Wireline Competition Bureau staff that included Lisa Hone, Pam Arluk, Gil Strobel, Irina Asoskov, Gregory Capobianco,¹ William Kehoe, Edward Krachmer, and Douglas Slotten to discuss AT&T's Petition for Forbearance in the above-reference proceeding ("Petition").² On June 21, 2017, the West and Consolidated Representatives, with the exception of Michael Shultz, met with Jay Schwarz and Kristine Fargotstein, Wireline Advisors to Chairman Pai on the same matter.³

¹ Gregory Capobianco participated in this meeting via teleconference.

² Michael Shultz, Brian Carr, and Allen Zoracki participated in these meetings via teleconference.

³ Brian Carr and Allen Zoracki participated in this meeting via teleconference.

During these meetings, the attached handout, containing a bullet point summary of Consolidated and West's December 2 and 19, 2016 filings in this proceeding,⁴ was distributed and discussed.

In addition, during one or more of these meetings, Consolidated and West emphasized that:

- Tandem and transport providers such as West and Consolidated provide vitally important services that facilitate efficient interconnection and routing and promote technology transition to IP.
- The flash-cut detariffing sought by AT&T's Petition, if granted, could jeopardize the ability of tandem providers to collect payment for services rendered.
- Nationwide forbearance is especially inappropriate given AT&T's claim that only a very small number of carriers are responsible for the traffic upon which AT&T's complains.⁵ Addressing issues associated with that traffic is best done on a case-by-case basis through Section 208 proceedings, not through broad forbearance that will result in risk and uncertainty for tandem and transport providers.
- AT&T, as an IXC customer of switched access services, lacks standing under Section 10(c) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 160(c), to seek forbearance from tariffing rules applicable to switched access providers, especially since AT&T itself maintains that the Act does not apply to it as a customer of access services.⁶
- The requested forbearance is problematic from a logistical standpoint, because tandem and transport providers cannot know if a subtending LEC is engaged in access stimulation, as defined under 47 C.F.R. 61.3(bbb).⁷ Consequently, tandem and transport providers would be vulnerable to risk if the forbearance requested is granted, especially where large IXCs aggressively withhold charges under

⁴ Consolidated Communications Companies and West Telecom Services, LLC's Motion for Summary Denial of and Opposition to AT&T's Petition, WC Docket No. 16-363 (filed Dec. 2, 2016); Reply Comments of Consolidated Communications Companies and West Telecom Services, LLC, WC Docket No 16-363 (filed Dec. 19, 2016).

⁵ Indeed, in AT&T's recent *ex parte* filing, it only identified only 17 out of 1,300 carriers—just over 1% of all carriers—as engaged in or supportive of traffic pumping that are associated with just 20% of the traffic. Letter from Matthew Nodine, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-363, at page 10 of attached slide deck (filed May 11, 2017) ("AT&T's May 11, 2017 *Ex Parte*").

⁶ Reply Comments in Support of Petition of AT&T Services Inc. for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 16-363, at n.22 (filed Dec. 19, 2016).

⁷ For example, a tandem provider cannot know if a subtending LEC has a revenue sharing agreement with a third-party.

allegations concerning a third-party's conduct. This, in turn, would increase transaction costs and legal fees of tandem and transport providers, resulting in higher prices and reduced competition in the tandem and transport market. This result is contrary to the public interest standard that must be satisfied under Section 10(a)(3) and (c).⁸

- If AT&T does not want to utilize the tariffed tandem switching and tandem-switched transport services for particular traffic associated with a subtending end office, AT&T should obtain facilities to achieve direct end office connections.

If you have questions or need additional information, do not hesitate to contact me.

Sincerely,

Philip J. Macres

*Counsel for Consolidated Communications
Companies and West Telecom Services, LLC*

cc: Jay Schwarz (all via email)
Kristine Fargotstein
Amy Bender
Lisa Hone
Pam Arluk
Gil Strobel
Irina Asoskov
Gregory Capobianco
William Kehoe
Edward Krachmer
Douglas Slotten

⁸ Because AT&T is apparently already monitoring and measuring the traffic of the carriers it has an issue with (see AT&T's May 11, 2017 *Ex Parte* at pages 10-12), AT&T can address associated issues on a case-by-case basis pursuant to a Section 208 complaint proceeding.

THE COMMISSION SHOULD DENY AT&T'S FORBEARANCE PETITION

Reasons to Deny on Threshold Grounds

- **The Petition Should be Denied as an Improper End-Run Around Significant Outstanding Issues Being Addressed in the Commission's Connect America Fund ("CAF") Proceeding and Its Implementation of the 2011 USF/ICC Transformation Order**
 - The Petition improperly seeks to expand the intercarrier compensation reforms adopted in the 2011 USF/ICC Transformation Order outside the immense and comprehensive record of the CAF proceeding
 - The FCC's objective in the CAF proceeding is to ensure all inter-related ICC reforms are considered and implemented through a **"holistic view of the entire record"**
 - In its initial implementation of the bill-and-keep framework, the Commission decided to transition only terminating switched access rate elements to bill-and-keep, with an end date of July 1, 2018 for price cap carriers and July 1, 2020 for rate-of-return carriers
 - This transition does **not** apply to tandem providers that do not serve end-users because such providers cannot "look[] to [their] end-users ... to pay for the costs of its network," as required under bill-and-keep
 - As for originating access and other remaining rate elements, the Commission adopted a permissive tariffing regime and capped such rates at current levels **until it establishes a transition timetable for these rate elements**
 - While access stimulation rules were adopted in the 2011 USF/ICC Transformation Order, the Commission carefully crafted such rules so that they were **"narrowly tailored to...avoid[] burdens on entities not engaging in access stimulation"** and the Commission explained that the "reform will, as the transition unfolds, address remaining incentives to engage in access stimulation"
- **The Petition Should be Denied Because AT&T Lacks Standing to Request Forbearance from Commission Rules that Apply to Access Service Providers**
 - Section 10(c) of the Communications Act allows a carrier to seek the Commission's forbearance from rules "with respect to *that carrier*...or any service offered by *that carrier*"
 - However, AT&T filed its Petition as an IXC "customer" of the services at issue, not as a carrier seeking to free itself from regulation
 - The Petition should be denied, because AT&T lacks standing to request forbearance from rules that apply to services it purchases as a *customer*

- **The Petition Should be Summarily Denied Because It Fails to Meet the Requisite Evidentiary and Analytical Thresholds**
 - Legal Standard: A petition is subject to summary denial when it does not address an issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria has been met
 - The Petition lacks the requisite evidentiary and analytical support
 - AT&T's assertions concerning the alleged stimulation schemes of "some carriers" are comprised entirely of anecdotal claims, which are unsupported by affidavit or other evidence
 - AT&T's claim that some carriers' tariffed rates for 8YY database dips exceed negotiated rates is likewise unsupported by affidavit or evidence
 - The Petition fails to include a competitive assessment based on granular market data and analysis, as required by the legal standard
 - AT&T's request relating to carriers not even engaged in access stimulation is particularly devoid of any supportive evidence or analysis
 - In a buried footnote, the Petition requests forbearance of the tariffing requirements for transport and tandem charges for calls to and from access stimulating LECs "*even if [the tandem provider] LEC is not itself engaged in access stimulation*"
 - The Petition provides no citation, evidence, or other support for this request
 - The Petition is effectively a belated petition for reconsideration of the *2011 USF/ICC Transformation Order* that should not be tolerated

Reasons to Deny on the Merits

- **If the Petition Is Not Summarily Denied, the Commission Should Deny It on Substantive Grounds**
 - Legal Standard:
 - The Petition has the burden of proof—which encompasses the burden of production and burden of persuasion—to prove the three elements set forth in Section 10(c) of the Communications Act
 - The Commission must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition among telecommunications providers
 - Element 1: The Petition fails to show that the rules at issue are not necessary to ensure charges and practices remain just and reasonable and not unjustly and unreasonably discriminatory

- AT&T's reference to alleged access stimulation schemes of carriers in two states does not demonstrate a need for nationwide forbearance
 - At best, the Petition merely describes a few incidents that, if truly problematic, could be addressed on a case-by-case basis in a Section 208 complaint proceeding
- Likewise, the Petition merely cites to the tariffed 8YY rates of a few LECs, which does not amount to a market analysis of the type required under the legal standard
- The rules at issue remain necessary
 - Permissive tariffing rules are necessary to ensure that providers of tandem switching and tandem-switched transport and 8YY database services are paid a just and reasonable rate—IXCs will have no incentive to negotiate a reasonable rate in the absence of a tariff, especially if equitable theories of recovery are unavailable without a negotiated agreement
 - AT&T's proposal to detariff tandem switching and transport rates would create significant uncertainty for tandem providers because they would have no reasonable way of knowing whether any of their subtending end office LECs are engaged in access stimulation, and thus would be unable to determine when mandatory detariffing may occur
- *Elements 2 and 3*: The Petition fails to show that permissive tariff rules are not necessary for the protection of consumers and forbearance from applying such permissive tariffing rules is consistent with the public interest

If Not Denied, Conditions Need to be Imposed

- **Even if the Commission Grants the Petition, Such Grant Must Be Subjected to Conditions and Clarifications**
 - If the Commission grants the Petition (which it shouldn't), it must impose conditions and issue clarifications to ensure that IXCs cannot avoid payment altogether in the absence of a negotiated agreement
 - Specifically, the Commission must condition any forbearance on a requirement that IXCs, in the absence of a negotiated agreement, pay a carrier's formerly tariffed switched access rates for tandem switching, tandem-switched transport, and 8YY database dips
 - The FCC should also clarify as a condition of any forbearance that, in the absence of a negotiated agreement:
 - An IXC that refuses to pay charges for switched access violates Sections 201 and 202 of the Act; and
 - Switched access providers may recover service charges under state-law theories of recovery, which are not preempted, and that a carrier's formerly tariffed rates constitute a reasonable rate of recovery